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August 21, 1991

VIA FAX MACHINE
(415) 744-1041

Ms. Linda Wandres
U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, California 94105

Re: Post Conference Submittal to Supplement Administrative
Record Concerning Administrative Order No. 91-16

Dear Linda:

Enclosed is the Post Conference Submittal of Cerrillos
Land Company, Santa Fe Pacific Railroad Company, and The
Atchison, Topeka and Santa Fe Railway Company. If you have
any questions, please contact me.

Very truly yours,



Larry P. Ausherman

LPA:cpc

Enclosure

cc: Gary Crosby
Wayne Jarke
Dennis Cole
Tim Leftwich
Paul Eby

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TRANSMITTAL COVER LETTER

Page 1 of 14 pagesDate: 8-21-91

Time: _____

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NAME Linda Wandres CITY San FranciscoTELECOPIER NO.: 415-744-1041FROM: Larry Ausherman Albuquerque, New Mexico

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF:

Approximately 640 Acres of
Land Located in Section 19,
Township 13N, Range 10W of the
Bluewater USGS Quadrangle
(A Portion of the Bluewater
Uranium Mining Sites)

POST-CONFERENCE SUBMITTAL
TO SUPPLEMENT
ADMINISTRATIVE RECORD
CONCERNING ADMINISTRATIVE
ORDER NO. 91-16

Respondents:

The Cerrillos Land Company, the Santa Fe Pacific Railroad Company, and the Atchison, Topeka & Santa Fe Railway Company

Respondents, Cerrillos Land Company, Santa Fe Pacific Railroad Company, and The Atchison, Topeka and Santa Fe Railway Company ("Respondents") make this submittal pursuant to Section X of Order No. 91-16 ("Order") and discussions at the August 13, 1991 administrative conference concerning the Order.

I. INTRODUCTION

On August 5, 1991, each of the Respondents received a copy of the Order. In conformity with Section X of the Order, the Respondents requested a conference with Environmental Protection Agency ("EPA") to discuss the Order. The request was granted by EPA counsel, Linda Wandres, and the effective date of the Order was extended. On August 13, 1991, a timely conference took place. The conference began by a site visit involving Tim Leftwich and Paul Eby on behalf of the Respondents, and Robert Bornstein and another EPA representative on behalf of the EPA. After the site visit, a conference involving those who visited the site plus Linda Wandres, Wayne Jarke, Dennis Cole, and Larry Ausherman was convened at the

office of Cerrillos Land Company in Albuquerque, New Mexico. As outlined below, the Respondents presented their concerns at the conference. EPA and the Respondents reached a working agreement regarding certain concerns. Respondents understand that some of that agreement will be reflected as an addendum which will become part of an order to be effective on August 23, 1991. Other parts of that agreement are described below, without formal inclusion in the addendum. The Respondents preserve and do not waive assertion of their positions on matters not agreed upon, some of which are described below.

The following discussion is organized in the order of the agenda used at the August 13 conference (attached as Exhibit A). That attached agenda also references sections of the Order applicable to each agenda item.

II. AGENDA ISSUES

1. Clarification of Entities and Roles. (Order § II, ¶ B)

For the present, the Respondents prefer that Cerrillos Land Company be the lead company for the three of them in coordination with the EPA. Respondents understand that EPA is in agreement with this approach, preserving its position that all three Respondents are jointly and severally liable. Respondents preserve positions of non-liability, including those articulated at Section II (15) herein. The Respondents understand that EPA will send copies of all notices and correspondence to all three Respondents, but will coordinate primarily with Cerrillos Land Company.

The business entity name at page 7, lines 5 and 6, is in error. The name "Santa Fe Pacific Properties, Inc." should be changed at both places it is used to "SFP Properties, Inc." The Respondents understand that this change will be incorporated by addendum in an order to be effective on August 23, 1991.

2. Ultimate Goal/Final Survey. (Order § V, ¶¶ C, G)

The Respondents agree to recontour the disturbed area in Section 19 to cover with at least 12 inches of neutral material the areas of radioactive contamination that now have readings of 180 uR/hr or greater to ensure that the radiation levels are below 180 uR/hr at one meter height. Final survey will be conducted using Ludlum Model 19 Micro R meters. Readings will be taken on 50 foot centers to ensure that the radiation standards are met. Respondents request confirmation of these conditions in the addendum of the order to be effective on August 23, 1991.

3. Work Plan. (Order § V, ¶ A)

A draft work plan will be submitted to the EPA on-site coordinator, Rob Bornstein, by Cerrillos Land Company, on behalf of Respondents, on Friday, August 23, 1991. This plan will contain a detailed operations and monitoring plan for the removal action. One meter height gamma measurements will be used to ensure consistency throughout this project as agreed to by the EPA on-site coordinator. The Respondents object to any Order provision obligating any of them to incorporate all of EPA's comments. Specifically with respect to the sentence beginning on line 19 of page 15, the language should recognize that EPA cannot require

revisions or make comments that are inconsistent with the National Contingency Plan. Respondents request confirmation of these conditions in the addendum of the order to be effective on August 23, 1991.

4. Site Health and Safety Plan. (Order § V, ¶ B)

A health and safety plan will be included as an appendix to the work plan. This will be submitted on August 23, 1991 to the EPA on-site coordinator. The Respondents object to any Order provision obligating any of them to incorporate all of EPA's comments. Specifically with respect to the sentence beginning on line 19 of page 16, the language should recognize that EPA cannot require revisions or make comments that are inconsistent with the National Contingency Plan. Respondents request confirmation of these conditions in the addendum of the order to be effective on August 23, 1991.

5. Post-Response Sampling Plan. (Order § V, ¶ C)

Sampling as detailed in the work plan will use Ludlum 19 Micro R meters for gamma radiation readings taken at one meter height. These instruments have been calibrated with the EPA's meters using a Pressure Ionization Chamber to provide consistency for post-project sampling results. Respondents request confirmation of these conditions in the addendum of the order to be effective on August 23, 1991.

6. Gamma Radiation Survey Results. (Order § V, ¶ D)

Verification that the gamma radiation readings are below the 180 uR/hr level will be made using the post-response sampling plan

as detailed in the work plan. Respondents request confirmation of these conditions in the addendum of the order to be effective on August 23, 1991.

7. Weekly Reports. (Order § V, ¶¶ E, F)

As agreed to with the EPA on-site coordinator, weekly summaries of past events and events scheduled for the following week will be provided to the on-site coordinator on behalf of Respondents by Cerrillos Land Company's on-site coordinator. These reports will be hand written and hand delivered to Rob Bornstein in the field. The reports will be short and concise, and will be an outline summary of the events of that week, and of the expected events of the coming week. The weekly summary will also act as the 48 hour notification to EPA of upcoming performance of any on-site work. Respondents request confirmation of these conditions in the addendum of the order to be effective on August 23, 1991.

8. Final Report. (Order § V, ¶ G)

On behalf of Respondents, Cerrillos Land Company will provide to EPA a final report as outlined in the Administrative Order within 14 days following the termination of the response action at the site. Respondents request confirmation of this condition in the addendum of the order to be effective on August 23, 1991.

9. Contractors. (Order § V, ¶ H)

A contractor will be selected by Cerrillos Land Company to provide the response action that is qualified and will have the proper safety and health training to work in the radiation environment at the site. Respondents request confirmation of this

condition in the addendum of the order to be effective on August 23, 1991.

10. Project Coordinator. (Order § V, ¶¶ J, K)

Cerrillos Land Company will designate a project coordinator who will be on site, or during his absence a designated alternate will be on site.

11. Access Issues. (Order § V, ¶¶ L, N, O)

Respondents expressed concern in conference that EPA's access be at reasonable times and in such a manner as not to interfere with operations. With respect to access available to Respondents, Respondents do not own the surface estate of Section 19. The surface estate of Section 19 is owned by third parties who may be PRPs. Unsuccessfully, Respondents have sought to reach agreement with the surface owners confirming surface access. Respondents will again try to confirm with the surface owners an arrangement by which Respondents will gain access to the premises. Respondents assert that ownership of the mineral estate should confer the right of access to the surface estate for reclamation operations, even without further arrangement. The surface owners apparently do not agree and are apparently requesting broad indemnity and payment as a condition to access. Respondents assert that denial of such access by the surface owners or conditioning of it with requests for indemnity or reimbursement to the surface owners is insupportable. Respondents will urge EPA to obtain access if Respondents' further efforts to do so are unavailing. Respondents understand that EPA will help them obtain such access if the

surface estate owners refuse to allow access for reclamation or try to condition it upon broad indemnity for past and future liability.

12. "Sufficient Cause" for Extensions. (Order § V, ¶ M)

Through agreement with EPA on-site coordinator and Cerrillos Land Company, Respondents may be granted an extension to complete the removal action if sufficient cause can be demonstrated. Respondents request confirmation of this condition in the addendum of the order to be effective on August 23, 1991.

13. Post-Conference Timing Matters.

Respondents are submitting this Post-Conference Submittal within the time frame agreed upon with EPA. Respondents understand that EPA will draft an addendum according to discussions with Respondents and this submittal and incorporate that addendum in an Order to be effective on August 23, 1991. Within three days of receipt of the Order, and probably sooner, Respondents will notify EPA of their intention with regard to compliance.

14. Form of the Order.

Respondents object to the Order in its present form. Respondents anticipate that the present Order will be modified by an addendum which will be incorporated in the Order which becomes effective. Respondents question the need for a § 106 Order, and Respondents preserve the right to take issue on this point. Ultimate acceptance of and compliance with the terms of the Order and addendum would not constitute a waiver of Respondents' position on this issue.

15. Defenses/Other PRPs.

On August 13, 1991 the Respondents briefly outlined for EPA certain positions that they take or may wish to take in a claim or action for reimbursement under § 9606(b)(2), a claim against the Fund for response costs under §§ 9611-12, a private cost recovery action under § 9607(4)(B), an action for contribution under § 9613 or state law, and other action. If Respondents elect to comply with the order, with addendum, to become effective on August 23, 1991, the Respondents would retain the option of later asserting any and all positions it may have that the Respondents or any of them are not properly deemed responsible parties under CERCLA, that other parties are responsible parties under CERCLA, that the Respondents are entitled to reimbursement or contribution from the Fund or any party pursuant to CERCLA or other law, or that the response action ordered by EPA was, in whole or in part, arbitrary and capricious or was otherwise not in accordance with law. Nothing discussed in the August 13, 1991 meeting or at any other time, or any action taken in compliance with EPA's Order, should be deemed to be a waiver or have the effect of estopping the Respondents from later asserting any and all of its defenses or other positions against any party or entity, in whatever forum. Respondents understand that EPA does not agree with all of Respondents' positions, but does not oppose Respondents preserving the right to assert them.

16. Clarification of Jurisdictional Matters.

The Respondents recognize EPA jurisdiction over CERCLA matters. Although the Navajo Tribe (or any Pueblo) has not asserted jurisdiction over removal or cleanup in Section 19, Respondents would not recognize and would expressly reject any future effort by the Navajo Tribe or any of its agencies to assert jurisdiction over Section 19. Section 19 is not part of the Navajo Reservation, and it is not "Indian country." Even if it were "Indian country" for criminal purposes, such a determination has no application in the regulatory context. The surface is owned by non-Indians, and the minerals are owned by non-Indians. The Respondents understand that Region IX of EPA (rather than Region VI) is supervising this removal action as a matter of administrative expediency only, and EPA has not decided that Section 19 constitutes Indian reservation lands, Indian lands, or Indian country. Respondents expressly reserve the right to contest Navajo Tribe involvement in this or any other removal, remediation, or cleanup action.

17. Future Issues.

Respondents do not anticipate imposition of penalties or punitive damages. Respondents understand that while EPA preserves the right to seek them in appropriate circumstances, EPA does not anticipate the need to seek penalties or punitive damages in this instance. Moreover, Respondents understand from discussions with EPA that EPA would not seek penalties or punitive damages without first notifying Respondents of the problem which forms the basis of

such penalties or punitive damages and providing Respondents a reasonable opportunity to cure the problem. Penalties or punitive damages require knowing violation.

Respondents believe that the contemplated removal action should diminish any perceived hazard or threat to health so as to render the site ineligible for inclusion on the National Priorities List. Respondents understand that EPA takes the position that upon completion of removal action, the matter may be referred to the remedial action division of the EPA for further study, but that this removal action should diminish the likelihood that this site would be listed on the National Priorities List.

Respondents recognize that no factual finding, conclusion of law, or determination has been made by the EPA as to whether the condition of the subject site has had any adverse effect on the health of any individual or group of individuals or the environment. Neither the existing Order nor the August 23, 1991 Order with addendum addresses actual health or environmental effects of the site. No finding of fact, conclusion of law or determination in this Order should be construed as relevant to the issue of actual effect on any individual or the environment or binding upon the Respondents. Neither these comments, the conference, nor any ultimate consent to an order by Respondents should be construed as any admission of any liability whatsoever.

MODRALL, SPERLING, ~~BOEHL~~, HARRIS
& SISK, P.A.

By: _____

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35700

AGENDA FOR
AUGUST 13, 1991 ADMINISTRATIVE CONFERENCE
REGARDING EPA CERCLA ORDER NO. 91-16

1. CLARIFICATION OF ENTITIES AND ROLES
 - A. Cerrillos Land Company
 - B. SFP Properties, Inc.
2. ULTIMATE GOAL/FINAL SURVEY
 - A. Instruments and Calibration
 - B. Reading Height
3. WORK PLAN (Order, §V, ¶A)
 - A. Field Gamma Survey
 - B. Warning Signs
 - C. Incorporation of EPA Comments
 - D. Clarification of Timetables
4. SITE HEALTH AND SAFETY PLAN (§V, ¶B)
 - A. Health Physicist
 - B. Incorporation of EPA's Comments
5. POST-RESPONSE SAMPLING PLAN (§V, ¶C)
6. GAMMA RADIATION SURVEY RESULTS (§V, ¶D)
 - A. Map
 - B. Calibration Documentation
 - C. Summary of Procedures
7. WEEKLY REPORTS (§V, ¶¶E, F)
 - A. Level of Detail
 - B. 48 Hour Notification
8. FINAL REPORT (§V, ¶G)
 - A. Facility, Locations and Substances
 - B. Chronology Describing Actions Performed
 - C. Listing of Resources Committed
 - D. Resolution of Matters Affecting Performance
 - E. Analytical Results of Sampling
 - F. Appendices and Affidavit
9. CONTRACTORS (§V, ¶H)
 - A. Process for Approval
 - B. Effect on Timetables

EXHIBIT A

10. PROJECT COORDINATOR (\$V, ¶¶J, K)
 - A. Qualification and Role
 - B. Correspondence
11. ACCESS ISSUES (\$V, ¶¶L, N, O)
 - A. EPA Access and Oversight
 - B. Surface Access
12. "SUFFICIENT CAUSE" FOR EXTENSIONS (\$V, ¶M)
13. POST-CONFERENCE TIMING MATTERS
 - A. Respondents' Written Submission
 - B. EPA's Written Comments
 - C. Effective Date of Order
 - D. Notice of Intent to Comply
14. FORM OF THE ORDER
15. DEFENSES/OTHER PRPs
16. CLARIFICATION OF JURISDICTIONAL MATTERS
 - A. Region IX vs. Region VI
 - B. Navajo Nation
17. LOOKING AHEAD
 - A. Avoidance of Penalties and Punitives
 - B. Avoidance of NPL/Remediation
 - C. Covenant Not to Sue
 - D. Provision Against Order as Evidence
18. COMPLETION OF ADMINISTRATIVE RECORD AND FINAL ORDER
19. OTHER

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